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May 13, 1999

Craig Melodia, Esq.
Office of Regional Counsel (C-14J)
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Re: Skinner Landfill
Cities of Blue Ash, Deer Park, Madeira, Mason, and Sharonville and Village of Lincoln Heights
Information From the Final Allocation Report

Dear Mr. Melodia:

Per our telephone conversation of yesterday and with consent of counsel for City of Blue Ash, City of Deer Park, City of Madeira, City of Mason, City of Sharonville, and Village of Lincoln Heights, I am enclosing excerpts from the final allocation report regarding the City of Deer Park, City of Madeira, City of Mason, City of Sharonville and Village of Lincoln Heights. The allocator did not discuss the City of Blue Ash and, therefore, the same waste figures that appear in the preliminary report should be used in calculating the EPA Municipal Settlement Policy amount for it.

If you have any questions regarding this matter, please call.

Very truly yours,

C. J. Schmidt

CJS:jlh
Enclosures
cc: Matthew W. Fellerhoff, Esq.
Jeffrey S. Goldenberg, Esq.
Thomas T. Keating, Esq.
Lisa M. Rammes, Esq.

Lincoln Heights' Comments. Lincoln Heights felt the Allocator was required to apply the "Gore factors" in an attempt to arrive at an equitable allocation. It felt that the Allocator is required to consider the amount of hazardous substances and the degree of toxicity of the materials. Lincoln Heights argued that EPA has found that MSW has fewer hazardous substances and is much less toxic than other waste. Hence, the Allocator "is required to consider this fact in his allocation." In this context, Lincoln Heights urged the use of EPA's Municipal Settlement Policy to form the allocation for MSW in this matter.

CITY OF DEER PARK

The City of Deer Park ("Deer Park") submitted a comment brief dated October 27, 1998 and a follow-up letter dated February 11, 1999. Deer Park correctly pointed out an error in the computation of its waste in amount. The correct divisor (see page 60 of Appendix 1) should have been $.21333 per cy not $.1067 per cy, to convert certain dollar entries in the Skinner log ($342) to cys based on 900 cys, not 1,800 cys, in total waste relatable to a fixed dollar sum of $192. As a result, Deer Park's corrected additional cys total is 1,603 cys, not 3,206 cys, giving Deer Park a total of 2,503 cys (1,603 plus 900), instead of 5,006 cys, before dealing with compaction issues.

The uncompacted cys total can be derived by substituting the 1,603 cys for 3,206 cys in the remainder of the Preliminary Report. Assuming 13/20 of 1,603 cys represent compacted cys, then the City's new total is 4,130 cys (13/20 x 1,603 x 2, or 2,084) plus 561 cys (7/20 of 1,603 cys) plus 1,485 cys (from the Final Report). The testimonial volume of 27 cys is added to this figure to produce a corrected waste-in amount of 4,157 cys.

CITY OF MADEIRA

The City of Madeira ("Madeira") submitted a brief dated February 10, 1999. Madeira disagreed with the Allocator that it has any liability for the response costs associated with the Skinner Landfill and stated there is no direct evidence to link it to the Site, either as a transporter or an arranger. Madeira argued that it never contracted with the Skinners, that the

Skinner Logs have no entries for Madeira, that there are no waste receipts or tickets which mention Madeira and lastly, the Skinners testified that they had no first-hand knowledge connecting Madeira to the Site.

Madeira said that Rodney Miller's testimony is the link connecting Madeira to the Site. It argued that Mr. Miller's testimony is insufficient to establish an allocable sum when Mr. Miller said that he was sure that Madeira's collector (Spaulding) used the Landfill but later said he did not have personal knowledge of the disposal of Madeira's waste at Skinner. Madeira also complained about my interpretation of Mr. Miller's testimony in comparison to my treatment of Deer Park, Silverton and Montgomery. I have reviewed Mr. Miller's testimony again, as well as the documentary basis provided by Madeira regarding its use of Spaulding as a collector, the closing of the landfill operated by Mr. Miller's father, and the opening of the Morrow landfill. I remain comfortable that the analysis in the Preliminary Report is a reasonable one and is consistent in its interpretation of the testimony of witnesses. Mr. Miller's testimony as to Deer Park, Silverton, and Montgomery was different from his testimony regarding Madeira. Hence, they were treated differently.

Madeira states that the waste-in amount was calculated at its "current" generation of waste, which they feel is highly inflated. Madeira argues that a resident in 1952 would have substantially less waste than a resident in 1998 and therefore the calculations in the Preliminary Report are too high.

Madeira's Position Paper dated May 28, 1998 provided:

> "Even assuming that the evidence indicates that Madeira contributed some waste to the site, the amount of residential household waste it deposited is limited to 624 tons. This represents an estimate of the amount of residential waste generated by Madeira for the six-month period January 1, 1952 through July 30, 1952."

Madeira derived this figure by taking one-third of the current number of residences (1/3 of 3,600, or 1,200) and the average waste amount generated per residence currently (40 to 50 pounds) and, thereby determining, "Madeira generated 48,000 pounds of waste per week in 1952, or 24 tons. Therefore, during the six months, Madeira generated 624 tons of waste (24 tons x 26 weeks = 624 tons)." I accepted this analysis, about which Madeira now complains, and converted 624 tons to 4,180 cys by multiplying by 2,000 lbs and dividing by 600 lbs/cys (for compacted waste) and then multiplying by 2 to address compaction.

Given Madeira's submission adopting a figure of 624 tons, I see no reason to change the analysis in the Preliminary Report. Madeira did not offer a density figure to convert pounds or tons to cubic yards. Below, I note that Madeira supports the use of the "Policy for Municipality and Municipal Solid Waste CERCLA Settlement at NPL Co-Disposal Sites" which was issued by the EPA on February 5, 1998. That document offers two densities: 100 lbs/cy for loose cys and 600 lbs/cy for compacted cys. Madeira says there is no testimony or records which indicate that Madeira used a compactor truck, so there is no basis to use the compaction ratio in calculating its allocation. At 100 lbs/cy for loose cys, Madeira's waste-in amount is 12,480 cys (48,000 cys

per week x 26 weeks divided by 100 lbs/cy). I had given Madeira the benefit of the doubt by using a compacted waste density and then the default multiplier to uncompact the waste, which resulted in a figure of 4,160 cys. Despite Madeira's submission, I have decided to leave this figure alone.

Madeira stated that if it is assigned an allocation, it must be based upon the Municipal Settlement Policy for Municipality. Madeira said that pursuant to the Case Management Order, the Allocator was instructed to consider any equitable factor in determining allocations, and it feels that this Policy is an "equitable factor." Although a municipality may have a large volume, the toxicity within any municipal waste is minimal, Madeira explained. This Policy recognized both the minimal toxicity as well as the minimal response costs associated with MSW. Through the Policy, EPA affirmatively determined the actual response costs a municipality would incur in cleaning MSW from an NPL co-disposal site and established an effective and efficient tool to settle a municipalities response cost, Madeira continued. Madeira explained that subsequent to the issuance of the PNARR the municipalities learned that EPA believed the Skinner Site was an appropriate site to utilize this settlement policy, and claimed that "[u]nless the Final Non-Binding Allocation Report and Recommendations incorporates the EPA Municipal Settlement Policy, Madeira will not be motivated to pursue the settlement of this matter through the Allocation proceeding."

It is not clear to me what Madeira is asking to be done in the Final Report. If EPA would settle with Madeira under the Municipal Settlement Policy, I do not believe there is anything about the ADR process that prohibits Madeira from trying to settle with the United States. Beyond these statements, I do not see how the existence of EPA's settlement policy in this regard affects the derivation of Madeira's waste-in amount.

CITY OF MASON

The City of Mason ("Mason") filed a comment brief dated February 10, 1999.

Mason argued that the Skinner logs and waste receipts do not support Ray Skinner's testimony that Mason used the Site for thirty or forty years, and therefore the testimony should be discounted and Mason should be given a zero allocation. If Skinner's testimony is deemed credible, Mason feels the amount was inflated. Based on Skinner's testimony, Mason never brought in full trucks therefore the allocation should be reduced to more accurately reflect Mr. Skinner's testimony. I do not regard the Skinner log as complete and I do not regard the absence of waste receipts as controlling. The approach taken as to Mason was part of a consistently applied set of analyses to all of the ADR participants especially with regard to the interpretation of the Ray Skinner testimony which I simply could not ignore.

Mason further argued that if it is assigned an allocation, it must be based upon the Policy for Municipality and Municipal Solid Waste CERCLA Settlement at NPL Co-Disposal Sites which was issued by the EPA on February 5, 1998. Mason explained that pursuant to the

Case Management Order, the Allocator was instructed to consider any equitable factor in determining allocations, and it feels that this Policy is an "equitable factor." Although a municipality may have a large volume, the toxicity within any municipal waste is minimal. This Policy recognized both the minimal toxicity as well as the minimal response costs associated with MSW. Through the Policy, the EPA affirmatively determined the actual response costs a municipality would incur in cleaning MSW from an NPL co-disposal site and established an effective and efficient tool to settle a municipalities response cost. Mason explained that subsequent to the issuance of the PNARR the municipalities learned that EPA believed the Skinner Site was an appropriate site to utilize this settlement policy, and claimed that "[u]nless the Final Non-Binding Allocation Report and Recommendations incorporates the EPA Municipal Settlement Policy, Mason will not be motivated to pursue the settlement of this matter through the Allocation proceeding."

It is not clear to me what Mason is asking to be done in the Final Report. The waste described by Ray Skinner was not municipal solid waste. And if EPA would settle with the City of Mason under the Municipal Settlement Policy, I do not believe there is anything about the ADR process that prohibits Mason from trying to settle with the United States. Beyond these statements, I do not see how the existence of EPA's settlement policy in this regard affects the derivation of Mason's waste-in amount.

CITY OF SHARONVILLE

The City of Sharonville's ("Sharonville") comment brief dated February 9, 1999, argued that Sharonville's liability at the Skinner Site is limited to the Skinner log entries of $844.81 in 1967 and $117.00 in 1974. Using an estimate of $15 per load from Elsa Skinner's testimony (E. Skinner Depo., p. 12), Sharonville calculated that the 1967 entry represented 56 truck loads. Sharonville further assumed that these truck loads were 5 cys dump truck loads that weighed 2 tons per load, or a total of 112 tons. Sharonville then multiplied this figure times $5.30 per ton from EPA's Municipal Settlement policy, saying it had only $593.60 in liability.

For 1974, using $15.00 per load, Sharonville computed 8 loads at two tons each to equal sixteen tons times $5.30 per ton, or $84.80 liability for Sharonville in 1974. However, Sharonville claims that "all of the 1974 debris was caused by the major tornado which struck Sharonville and 42 U.S.C. 9607(b) provides no liability ... from damages resulting from "an act of God". Sharonville's position is that "all of the 1974 dumping, minimal as it was, was caused by an act of God for which Sharonville is not responsible."

The act of God defense has no application here. An act of God may have created the waste, but Sharonville independently made the judgment to dispose of the waste once it was created.

The Preliminary Report relied on testimony of Ray Skinner and Maria Skinner that was both qualitative and quantitative in nature. It subsumed within that testimony the Skinner log entries which, at $951.81, by no means are insubstantial sums (it is the tenth largest dollar entry in the log if transporters and construction or wrecking companies are removed from the list).

As to the volume, I am comfortable that the analysis in the Preliminary Report is a reasonable one. Ray Skinner and Maria Skinner both described a long period of usage of the landfill. Ray Skinner was closer to day-to-day operations that Maria Skinner. Hence, using his volume estimate is not inappropriate compared to her volume estimate and is consistent with the treatment of both witnesses in the Preliminary Report. I subsumed into the volume the log entries. I do not agree that the entries for 1967 should be counted at $7 per load. Nor do I believe that they necessarily represent 5 cy loads. Nor, given the omissions in the log, is it necessarily reasonable to conclude that the entries (which cover August, September, October, November and December, 1967) should be limited to those months. Given the dollar amounts, I expect that these entries actually represent compacted packer waste.

Sharonville felt that the Allocator's use of City Council Minutes (that referenced 497 dump truck loads in one year which was more than the City had estimated in its questionnaire response) was inappropriate and offered reasons why. However, I did not use this estimate in my waste-in analysis. I simply noted that the number of loads reflected in the minutes raised questions about the number of waste related loads generated each year.

Sharonville also argued about the presence of hazardous substances in its waste. I respect each party's view of this subject, but I addressed this subject generically in the main body of the Preliminary Report and see no reason to add more to that discussion here.

Sharonville further argued that it would produce employee testimony that would contradict the testimony of the Skinners. I took into account Sharonville's submissions initially and, again, I respect the right of any party to pay its lawyers to litigate. Issues of fact exist throughout this case and I tried to address them in a consistent fashion. The district court will consider not only a party's volume but also its level of cooperation and any other equitable factor that the district court deems appropriate.

Sharonville said that the Preliminary Report "loses sight of the fact that if this case is not settled through the ADR process, Plaintiffs will have to prove their case according to the normal rules of evidence." To the contrary, having been involved in dispute resolution at the end of discovery and just before trial, I am painfully aware of the costs and risks of Superfund landfill litigation. I respect Sharonville's belief that the evidence is "weak at best." It has merely joined the chorus in so stating. I have tried to deal with the evidence presented in a consistent manner in the hopes that the parties will be given a framework for settlement. Plainly, I cannot make parties settle.

Sharonville felt that the most important fact that diminishes the credibility of the Preliminary Report is that it relies heavily on the testimony of Elsa and Ray Skinner. The Skinners have the greatest motivation to lie, or recollect facts, Sharonville argued. Again, I recognize that credibility issues will be raised, just as I recognize that discovery of each party's witnesses has not been meaningfully undertaken. The ADR process is not meant to be a surrogate for a trial after full discovery. If Sharonville wishes to litigate credibility issues, it is entitled to do so.

Sharonville consistently referred to what it would prove before the "jury." I do not believe that this matter would be tried to a jury. Sharonville argued that the Allocator should factor in the "strong probability of Plaintiffs' loss at trial. This is how most parties evaluate settlement. Doing so, in this case would result in a much lower allocation for Sharonville than the Allocator has proposed." Allocators do not settle cases. Parties do. Sharonville can evaluate better than the Allocator can what it will cost to try this case, what a full discovery record might show, what its settlement options are, what risk it faces in relation to equitable factors analysis and orphan share funding that might be made available to cooperating parties, and the myriad of other factors that go into the resolution of a Superfund claim. At the end of the day, if it elects not to settle, that is its prerogative. It may well achieve a better result at a trial, but I feel confident in saying also that it might not.

Sharonville also endorsed the Municipal Settlement Policy. Again, this policy involves a settlement with the United States. If EPA is willing to settle with Sharonville on a basis agreeable to Sharonville, and if the settlement is approved by EPA management and survives public comment, Sharonville, I suppose, must consider that option. I have no control over EPA settlement decisions, however.

Sharonville concluded by saying that the Preliminary Report needs "major revisions." It stated that "Sharonville, a small city with less than 3,000 homes, will not accept unjustified liability for its minimal non-hazardous waste compared to the liability of the industrial, toxic waste contributors who have polluted the Skinner landfill." It suggested that the Municipal Settlement policy should be used as a "maximum" guideline for Sharonville's participation. It

stated that the Plaintiffs were the major contributors to the problems at Skinner and that Plaintiffs now seek to avoid this responsibility by including as many other contributions to the Site as possible. It felt the only way that the ADR process was going to be successful was if the Allocator reaches a reasonable conclusion based upon the evidence as opposed to unsupported assertions by Plaintiffs' counsel. Sharonville does not agree that it is a "major contributor," and if such a conclusion is reached, it will be rejected by Sharonville.

I appreciated the depth of feeling in Sharonville's submission but I reached the conclusions I reached based on the record that was before me taking into account the nature and purpose of the ADR process and trying to apply consistent rules to the interpretation of often conflicting evidence at this, admittedly, extremely difficult Superfund Site. While I fully respect the right of Sharonville to dissent, within this framework I believe that the conclusions reached were reasonable as to Sharonville, and the other parties. The facilitation process, perhaps, will allow the parties to resolve what differences they have in a positive way. However, if it does not, the district court, I feel certain, is ready, willing and able to manage the litigation process to its expensive end.

VILLAGE OF LINCOLN HEIGHTS

The Village of Lincoln Heights ("Lincoln Heights") served its comment brief dated February 10, 1999. Lincoln Heights disputed the Allocator's conclusions both on the law and the facts. It stated that the Allocator discounted its arguments in its position paper calculating the number of loads on the low end and agreed with the calculations on the high end and that the Allocator based his conclusion on the assumption that since one group of loads was dumped for $7.00 a load, all loads were dumped for this price. Therefore, it stated that the Allocator determined the number of loads by dividing the amounts on the ledger by $7.00. It felt that the testimony did not support this approach. It claimed that Mr. Lawson, a driver, only remembered taking wastes two to three times a week, while Mr. Boggs, another driver, had *no recollection* of the Skinner Site at all. It felt that if it frequented the Site as often as concluded by the Allocator, Mr. Boggs would certainly remember it. It stated that "[t]he Village is cognizant of the fact that hard records can sometimes be more reliable than human memory, but when the hard records, the ledgers in this case, become part of the calculations based on assumptions that reach conclusions that do not mesh with the memory of the individuals who were actually there, these conclusions cannot be seen as so reliable."

Lincoln Heights said it presented a number of interpretations based on the facts at hand and that the Allocator should do the same. It requests that the Allocator reconsider his conclusions and make adjustments downward, considering this conflicting evidence.

With regard to "roadside debris" (50 cys was assigned to Lincoln Heights) the only evidence is that of the testimony of Ray Skinner, who testified that such debris was brought to the dump between 1982 and 1990. Lincoln Heights claims there is no evidence tying it to the Site during that period, and stated that, "Chief McCowen is certain that all such waste was brought to Rumpke once the contract was signed. He has no knowledge of such waste being brought to Skinner in the 1980's."

I have reviewed the analysis of Lincoln Heights waste-in amount contained in the Preliminary Report. I recognized then the evidentiary issues raised. The pattern of the Skinner log suggested a charge of $7.00 per load across the board and a frequency of delivery greater than that recalled by the one witness. I remain comfortable that Lincoln Heights was treated consistently with all other parties. The treatment of the roadside debris volume was also consistent with the treatment of this issue as to other municipalities.

Ability to Pay. Lincoln Heights had advised all of the ADR participants that it had an ability to pay issue. The Preliminary Report noted this fact and also noted that Lincoln Heights said nothing about insurance coverage. In its comments, Lincoln Heights simply stated that, with regard to insurance coverage, Lincoln Heights' actions were limited to 1967-68, and CERCLA did not exist at that time, therefore it did not have insurance coverage. That should not follow as I understand the case law generally. I assume that Lincoln Heights had comprehensive general liability insurance. I would suggest that Lincoln Heights determine the existence of such coverage and its possible application here as part of any

ability to pay presentation it may make during the facilitation of this matter or in some other setting.

Lincoln Heights acknowledged that the Allocator was not bound by the Municipal Settlement Policy but felt that its MSW should be treated differently than the waste of other parties. I deal with that issue separately. As to the application of the Municipal Settlement Policy, I have discussed the Policy elsewhere and in the Preliminary Report that parties should deal with EPA directly if they wish to try to settle directly with the United States under the Policy.